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January 14, 2010

VIA Electronic Filing

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW,
Washington, DC 20423-0001

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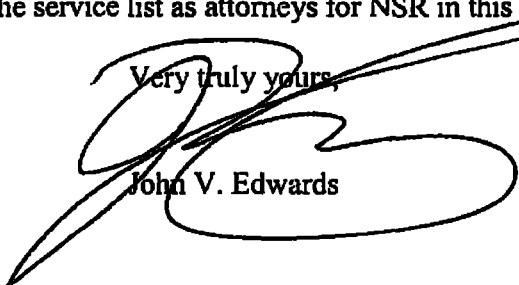
Re: STB Docket No. AB-290 (Sub-No. 311X), Norfolk Southern Railway Company -
Petition for Exemption - Abandonment of Rail Freight Service Operation - In the
City of Baltimore, MD and Baltimore County, MD

Dear Ms. Brown:

I attach for electronic filing the Reply of Norfolk Southern Railway Company Reply to the Motion for Protective Order filed by James Riffin in the subject proceeding.

Also, in addition to me, Daniel G. Kruger, Attorney, Norfolk Southern Railway Company at the above address, should be added to the service list as attorneys for NSR in this proceeding.

Very truly yours,


John V. Edwards

Attachment

cc via e-mail : jimriffin@yahoo.com
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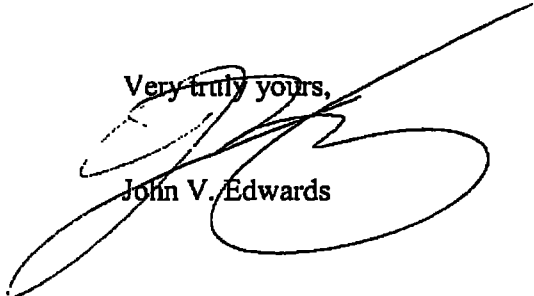
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Re: STB Docket No. AB-290 (Sub-No. 311X), Norfolk Southern Railway Company -
Petition for Exemption - Abandonment of Rail Freight Service
Operation - In the City of Baltimore, MD and Baltimore County, MD

Dear Ms. Brown:

In my filing of the Reply of Norfolk Southern Railway Company Reply to the Motion for Protective Order and the Motion to Strike in the subject proceeding, I failed to note service on Cheryl Kerr, Maryland Department of the Environment and Jo Ann Linger, Baltimore Gas and Electric Company, each by e-mail. By my signature below, I certify that I have, this day, served those two documents on both Cheryl Kerr and Jo Ann Linger by e-mail. I further certify that I have, this day, serviced this Certificate of Service on each of the following persons: Cheryl Kerr, Jo Ann Linger, James Riffin and Charles Spitulnik.

Very truly yours,


John V. Edwards

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB DOCKET NO. AB-290 (SUB-NO. 311X)

NORFOLK SOUTHERN RAILWAY COMPANY
– PETITION FOR EXEMPTION –
ABANDONMENT OF RAIL FREIGHT SERVICE OPERATION –
IN THE CITY OF BALTIMORE, MD AND BALTIMORE COUNTY, MD

NORFOLK SOUTHERN RAILWAY COMPANY'S
REPLY TO MOTION FOR PROTECTIVE ORDER

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Attorneys for
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Dated: January 14, 2010

Before the
Surface Transportation Board

STB Docket No. AB-290 (Sub-No. 311X)

Norfolk Southern Railway Company
– Petition for Exemption –
Abandonment of Rail Freight Service Operation –
In the City of Baltimore, MD and Baltimore County, MD

Norfolk Southern Railway Company's
Reply to Motion for Protective Order

Norfolk Southern Railway Company ("NSR") hereby replies to and opposes¹ the January 5, 2010 Motion of James Riffin ("Riffin")² and four persons who are unidentified except by

¹ NSR has separately submitted a Motion to Strike in this proceeding, which includes, among other things, a motion to strike the Motion for Protective Order. This Reply to the Motion for Protective Order is submitted should the Motion to Strike not be granted, or is granted only in part, with regard to the Motion for Protective Order.

² Riffin has become well known to the Board as a frivolous and vexatious litigant. See e.g. *Baltimore County, Maryland v. Riffin*, Civil Action No. RDB-07-2361, United States District Court For the District of Maryland, Memorandum Opinion of October 4, 2007; *James Riffin - Petition for Declaratory Order*, STB Finance Docket No. 35245 (STB served September 15, 2009), petition for review filed November 12, 2009; *Norfolk Southern Railway Company - Abandonment Exemption - In Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub-No. 293X) (STB served Nov. 6, 2007, Dec. 6, 2007); *James Riffin d/b/a The Northern Central Railroad - Acquisition and Operation Exemption - In York County, PA*, STB Finance Docket No. 34552, *slip op.* at 6 (STB served Feb. 23, 2005). In *Norfolk Southern Railway Company - Abandonment Exemption - In Norfolk and Virginia Beach, VA*, STB Docket No. AB-290 (Sub-No. 293X) (STB served November 6, 2007), the Board noted Riffin's improper efforts to harass "NSR into conveying the freight operating rights of the Cockeyville Line to Mr. Riffin." The Board stated: "Accordingly, we will closely scrutinize any future filings by Mr. Riffin in this or any other proceeding before the Board, and we strongly admonish Mr. Riffin that abuse of the Board's processes will not be tolerated."

We do not cite the consolidated cases from Baltimore County, MD District Court in

name³ for a protective order pursuant to 49 C.F.R. § 1104.14(b) in this proceeding. The persons submitting the Motion for a Protective Order collectively call themselves "Offerors" in line with their Notice of Intent to file an Offer of Financial Assistance ("OFA") to acquire NSR's operating rights over the line of railroad⁴ that is the subject of this proceeding. Because Riffin is

which Riffin was declared a frivolous and vexatious litigant and ordered to seek leave from the administrative judge of the District Court before filing "any pleadings." In *Riffin v. Circuit Court for Baltimore County*, No. 2939, September Term, 2008, Court of Special Appeals of Maryland, 2010 Md. App. LEXIS 6, Filed January 5, 2010, the Court vacated the order and remanded the cases to the Circuit Court for Baltimore County for further proceedings because the order did not afford Riffin the due process right of notice and an opportunity for him to be heard before the issuance of the pre-filing order.

³ The Offerors' motion and other January 5, 2010 filings provide no information about the other four "Offerors," not even their addresses. However, a person by the name of Eric Strohmeyer has previously been identified to the Board as a Vice President of "CNJ Rail Corporation." Whether or not this is the same Eric Strohmeyer is unknown. Further, to our knowledge, no other person connected with CNJ has ever been publicly identified. In *Maryland Transit Administration - Petition for Declaratory Order*, STB Finance Docket No. 34975 (STB served September 19, 2008), the Board noted: "Notwithstanding the name it has chosen, CNJ does not own any rail assets or conduct any rail operations."

Only Riffin signed the motion for a protective order. Riffin can not represent the other named persons. See, 49 C.F.R. Section 1103.3(b) and NSR's Petition to Strike, submitted herewith. Further, he cannot submit verifications on behalf of others he cannot represent. See e.g., Paragraph 10 of the Motion for Protective Order, in which the allegations of "fact" contained in the motion are supported by a verification that does not conform to the Board's regulations (the verification omits the statement that the person signing the motion is qualified and authorized to submit the motion). Riffin attempts to evade the Board's regulation on qualifications to represent others before the Board by a claim (supported by a signature of the other purported Offerors) that he is authorized to sign filings for them. While those persons and, according to the motion, "participants" yet unnamed, may properly appear or participate in the proceeding as parties or non-parties, as the case may be, if they have standing, and may have or receive confidential information related to this proceeding, Riffin, as a non-attorney and non-practitioner, can not represent them. Moreover, their identity, interest, financial responsibility and proposed role in the operation can not remain unstated if they are to be "Offerors". If these persons do continue to participate in this proceeding, NSR expects and requests the Board to require that they be fully identified, adequately explain their interest and standing in the proceeding and be equally bound by any protective order or confidentiality undertaking issued by the Board in this proceeding.

⁴ The subject line of railroad is a 13.26-mile dead-end segment commonly called the Cockeysville Industrial Track between railroad milepost UU-1.00 (located just north of

not an attorney or licensed STB practitioner, Riffin has no right to represent other parties or to make statements or presentations on behalf of other parties such as the "Offerors." 49 C.F.R. § 1103.2. The Offerors are either acting in their individual capacity or together in some sort of organizational capacity. If in the former, most of the Offerors are unidentified and unidentifiable. If the latter, the nature of the organization, company, collective, association or whatever is not identified.

In any event, if the persons submitting the Motion for a Protective Order are acting collectively in an organized manner or capacity, the organization has not submitted the motion nor agreed to be bound by a protective order. If the persons submitting the Motion for a Protective Order are each acting in their individual capacity, a vast majority of those persons have not agreed to be bound by a protective order.⁵ To the extent a protective order is imposed in this proceeding, NSR should not be required to provide any information or data to any person or person that is not identified or identifiable.

NSR objects to the Riffin's request that the Board classify his so-called marketing data as "highly confidential" information and therefore prohibit its disclosure to MTA and to NSR in-house counsel, as further explained below. If the Board believes that any protective order and confidentiality undertaking is required in this proceeding at all, NSR requests that the Board adopt a protective order and undertaking identical in all material respects to the Protective Order

Wyman Park Drive, formerly Cedar Avenue) and the end of the CIT line south of the bridge at railroad milepost UU-15.44 in the City of Baltimore and Baltimore County, MD ("the Line"). The Line and an explanation of the apparent, but not actual, discrepancy between the mileage and the milepost designations are more fully described and explained in NSR's Petition for Exemption filed December 16, 2009 in this proceeding.

⁵ In any event, because Riffin is not able to represent others or an organization of others, none of the Offerors should be allowed to view confidential material without that Offeror

and Confidentiality Undertaking issued by the Board in a decision served June 11, 2009 in STB Finance Docket No. 35245, *James Riffin - Petition for Declaratory Order* and STB Finance Docket No. 35246, *James Riffin - Acquisition and Operation - Veneer Spur - In Baltimore County, MD* (the "*Veneer Spur Proceedings*"). Of course, any such order should not preclude NSR from employing outside counsel later in this proceeding if for any reason NSR decides to do so.

Maryland Transit Administration ("MTA"), a modal administration of the Maryland Department of Transportation ("MDOT"), is the owner of the Line and operates a light rail commuter service over the Line. MTA has already responded to the Riffin Motion and proposed a revised protective order similar to the one proposed by MTA in the *Veneer Spur Proceedings*. While this proposed order is superior to Riffin's proposed order, it does not protect the interests of NSR in-house attorneys to receive the confidential material and to handle the matter without the assistance of and expense of hiring outside counsel as they routinely do in this type of proceeding.⁶ Therefore, as noted in the previous paragraph, NSR requests that if the Board issues a protective order with confidentiality undertaking in this proceeding that the protective order and undertaking be the same in all material respects with the protective order and undertaking in the *Veneer Spur Proceedings* with slight modifications noted below. The proposed Protective Order with Confidentiality Undertaking is shown in Appendix A and

executing a Confidential Undertaking.

⁶ NSR occasionally hires outside counsel to represent it before the Board but rarely does so in this type of proceeding. We can not now predict whether NSR might have some reason to employ such counsel in this proceeding before the matter is concluded but NSR has no current plans to do so and should not be forced to do so in order to review whatever "confidential" information apparently submitted by one or more of the persons named as "Offerors".

accompanying Exhibit to this Reply.

The main purpose of a protective order is to protect commercially sensitive information from competitors. The competitors may be parties to the case although they frequently are non-parties who might find the information if it were placed in the public docket. NSR, MTA, MDOT and the MDOT modal administrations are not competitors of any of the Offerors, to the extent they can be identified, including but not limited to Riffin in his individual capacity.

The Offerors claim that "The MTA is a competitor" and "The Offerors view the MTA as a competitor," but Motion and other documents filed with it failed to identify the Offerors with any level of specification to permit the Board to make any sense whatsoever out of such statements. In any event, MTA has explained that MTA, MDOT and the MDOT modal administrations are not competitors of Riffin.

The Offerors do not claim that NSR is a competitor. Instead, the Offerors merely claim on page 4 of the motion for a protective order in this proceeding that "Norfolk Southern has taken no position with respect to The Offerors's [sic] request for a protective order." This is essentially the entire basis for applying the restrictive protective order and prohibiting access for NSR in-house attorneys to purportedly highly confidential information. Inasmuch as (i) NSR's attorneys first saw the motion for a protective order in this proceeding on January 6, 2010, the day after it was filed and after the statement was made, and (ii) NSR previously objected to a nearly identical proposed "highly confidential" designation for similar, if not identical information and nearly identical motion for a proposed protective order and identically worded undertaking concerning the same Line in the *Veneer Spur Proceedings*, Riffin's baffling and, at best, disingenuous statement provides no basis for his proposed protective order and undertaking

in this proceeding.⁷

Certainly, NSR's in-house attorneys, who do not engage in sales and marketing, present no threat of competition to the Offerors' putative operation, whatever that operation may be. Even if the information referenced in the pleading and proffered to the Board was commercially sensitive, placing it in the hands of an attorney who has executed an undertaking not to disclose the protected information would not disadvantage the Offerors commercially. NSR's attorneys can keep information confidential from NSR sales and marketing personnel, subject to a proper protective order and confidentiality undertaking.⁸

NSR should not be required to hire outside counsel in order to have access to the type of "confidential information" (or, indeed, possibly the very same information) that Riffin has submitted in the past, subject to the less restrictive protective order and undertaking. Such less restrictive protective order and undertaking permitted NSR in-house attorneys to receive the information in a proceeding that involved traffic that would move over the same Line that is at

⁷ The Offerors' claim, in any event, is highly misleading, implying that the request for a protective order was presented to NSR and that NSR took no position regarding the imposition. Because one cannot take a position on something that one does not even know exists, the statement is false and renders the verification made in Paragraph 10 an essential nullity.

⁸ An indistinguishable set of facts was presented with respect to receipt of "confidential information" by UP in-house counsel in *Los Angeles County Metropolitan Transportation Authority - Abandonment Exemption - In Los Angeles County, CA; Motion for Protective Order*, STB Docket No. AB-409 (Sub-No. 5X) (STB served July 2, 2008). In that proceeding Riffin argued that similar "marketing" information should be designated as "highly confidential." He argued that UP in-house counsel should be prohibited from reviewing the material. In fact, the material consisted of little more than vague and conditional letters of support by persons that had not been railroad customers. The Board concluded that "there is no reason UP in-house counsel should not have access to these materials." The Board should come to the same conclusion here regarding similar information that the Offerors likely have submitted and have designated "highly confidential".

issue here, issued by the Board in the *Veneer Spur Proceedings*.⁹ In a decision served June 11, 2009 in the *Veneer Spur Proceedings*, the Board granted Riffin a modified protective order but denied Riffin's requests to designate the material as "highly confidential." The Board also stated that any information already disclosed in public dockets should not be considered confidential pursuant to the protective order. The Decision read in pertinent part:

Riffin's request for a protective order in these proceedings will be granted with modifications. Riffin's arguments that both MTA and NSR are his competitors are unpersuasive, and there is no reason to prohibit their in-house counsel and employees from seeing this information. MTA has explained that it is a public body providing public passenger rail transportation, not a competitor of the commercial freight rail service Riffin would seek to operate. MTA's use of subsidies to encourage businesses on the Cockeysville Industrial Track to use non-rail transportation does not transform it into a competitor of Riffin. NSR has also shown that it would not compete with Riffin's proposed operation and, therefore, that there is no commercial reason to keep the information Riffin has submitted from the parties' in-house counsel or employees. The Board will therefore re-designate the documents that Riffin has labeled "highly confidential" to be "confidential" and modify the proposed protective order accordingly.

* * *

We note, however, that certain documents Riffin has designated as "highly confidential" were previously submitted as part of public dockets in other proceedings. Those documents may not be classified as "confidential" in this case.

Veneer Spur Proceedings, slip op. at 2-3 (footnote omitted). As explained in the *Veneer Spur Proceedings* Decision, the documents that Riffin had submitted and claimed to be highly confidential despite being submitted on the public record included letters from Packard Fence

⁹ It is likely that the information submitted in this proceeding the same, or nearly the same, information submitted by Riffin and publicly disclosed in other proceedings that again involved the subject Line. Much of this material likely is on the public record in STB Finance Docket No. 24975, *Maryland Transit Administration - Petition for Declaratory Order* and STB Docket No. AB-290 (Sub-No. 237X), *Norfolk Southern Railway Company - Abandonment Exemption - In Baltimore County, MD*. That information consisted merely of conditional, vague and speculative letters of support without any definite commitment to ship any specific minimum volume of traffic over the Line at any specific rate. Nothing more is expected here, but NSR

Company, SealMaster Pavement Products & Equipment, Buschemi Stone Masonry, Inc., and European Landscapes and Design. Each of these were submitted by Riffin on May 11, 2007, in STB Finance Docket No. 24975, *Maryland Transit Administration - Petition for Declaratory Order*. *Id.*, slip op. at 3, note 3. Another document that Riffin submitted as “highly confidential” despite being previously submitted on the public record was a letter from Mark Downs Office Furniture, which was previously submitted on February 24, 2006, in STB Docket No. AB-290 (Sub-No. 237X), *Norfolk Southern Railway Company - Abandonment Exemption - In Baltimore County, MD*. *Id.*

There are no objective, commercially reasonable and cognizable indicia of a current or potential future competitive environment between NSR and the Offerors in this case. Indeed, the Offerors do not even reiterate the previous unsupportable argument Riffin made in the *Veneer Spur Proceedings* that Riffin would be a competitor of NSR. Instead, in order to support the effort to keep information from being evaluated by NSR, or otherwise to impose unnecessary expense on NSR, the Offerors simply rely on (1) the unsupported and unfathomable assertion that NSR has not taken a position the previously undisclosed motion and (2) has hired outside counsel in a previous proceeding. The argument is thus even more weakly based than the identical argument that the Board rejected in the *Veneer Spur Proceedings* with respect to identical or very similar material, involving the same purported customers and the same Line. The argument should be rejected again in this proceeding.

Moreover, the Offerors have provided no additional, persuasive reason for the Board to grant a stricter designation for that information as “highly confidential” or to impose a more

should be permitted to review the evidence placed before the Board.

comprehensive protective order in this proceeding, especially with respect to disclosure of the information to NSR's in-house attorneys. Because NSR (and MTA, MDOT and the MDOT modal administrations) do not and would not compete with the Offerors' putative operation even if it were more than pure speculation, a typical protective order is not required in this proceeding. Certainly the Offerors have not justified, nor can they justify, the imposition of an order and undertaking that is more restrictive than orders and undertakings that were adopted in past proceedings with regard to the exact same purported customers and the exact same Line.

The Board has permitted NSR in-house counsel to receive supposed confidential information for review and response in other proceedings as well. In *Norfolk Southern Railway Company - Discontinuance of Service Exemption - In Stanly County, NC*, STB Docket No. AB-290 (Sub-No. 254X) (STB served September 1, 2006), the Board recognized that NSR should not be put to the expense of hiring outside counsel simply to review materials and to respond to arguments concerning supposed confidential information that was presumably a key element of the case if NSR's in-house attorney, as NSR's legal representative in the proceeding, executed the proper undertaking. NSR's attorney executed that undertaking, received the information and treated it with the appropriate confidentiality.

Not only are there no valid commercial reasons to keep the "marketing" information tendered by the Offerors confidential from anyone at NSR, much less from its counsel who would use the information only for purposes of these proceedings, the Offerors would need to disclose the information to establish commercial relations between NSR and the putative operation. If the Offerors expect to interchange traffic with NSR, NSR would have to evaluate

that information.¹⁰ NSR could not be expected to take on faith that the Offerors have secured sufficient guaranteed business (or any business at all), not to mention the type of business to be handled or the volumes of that business, to justify any expense connected with the reviewing the operations and other arrangements that might be needed for the interchange of traffic between NSR and the Offerors' operations.¹¹

The Offerors' forthright statement concerning the "tenuous" relationship between the Offerors and prospective shippers described in Paragraph 3 of the Motion shows that the Offerors have no real, concrete commercial interests to protect with respect to material concerning prospective freight traffic that could move over the line. Issues that have arisen with Riffin's prior submissions to the Board,¹² provide a further rationale for not adopting a protective

¹⁰ In the Notice of Intent to file an Offer of Financial Assistance, the Offerors request a copy of a proposed interchange agreement.

¹¹ See e.g. *Michael H. Meyer, Trustee in Bankruptcy for California Western Railroad, Inc. v. North Coast Railroad Authority, d/b/a Northwestern Pacific Railroad*, STB Finance Docket No. 34337 (STB served January 31, 2007); *Minnesota Northern Railroad, Inc. v. Canadian National Railway Company*, STB Docket No. 42080 (STB served March 18, 2005).

¹² See, e.g., *James Riffin d/b/a the Northern Central Railroad - Acquisition and Operation Exemption - In York Co., PA*, STB Finance Docket No. 34501 (STB served February 23, 2005), *slip op.* at 5 (in revoking exemption, the Board held that "it appears that [Riffin d/b/a] NCR is attempting to use the cover of Board authority allowing rail operations in Pennsylvania to shield seemingly independent operations and construction in Maryland from legitimate processes of state law.... The Board has a responsibility to protect the integrity of its processes, and the Board is concerned that Riffin may be using the licensing process in improper ways."); *James Riffin d/b/a The Northern Central R. Acquisition and Operation Exemption In York Co., PA, and Baltimore Co., MD*, STB Finance Docket No. 34484 (STB Served April 20, 2004), *slip op.* at 2 (revoking Riffin's purported notice of exemption as insufficient to justify the use of the streamlined exemption procedures due to the multiplicity of factual and legal issues Riffin failed to adequately address). Additionally, the Offerors include allegations at Paragraph 4 of the Motion for Protective Order that are irrelevant to the Board's consideration of the request for a Protective Order. The Offerors fail to note that this Board gave no credence whatsoever to these same types of allegations in its decision in STB Docket No. AB-290 (Sub-No. 237X), *slip op.* (served March 31, 2006). Furthermore, MTA has addressed in detail, and the Board has considered and rejected these allegations, in *Maryland Transit Administration - Petition for*

order and undertaking in this proceeding. Again, if an order and undertaking are adopted, however, they should be substantially the same as the order in the *Veneer Spur Proceedings*, after which the draft in Appendix A and accompanying Exhibit is patterned. Also, each of the Offerors submitting confidential or highly confidential information should be required to submit a certification regarding the confidential or highly confidential nature of all information for which he/she seeks to claim confidential or highly confidential status.

In addition to the above rationale for permitting NSR in-house counsel to view the confidential information already submitted, the information submitted should be released because it would form a fundamental part of the Offerors' OFA case. The information the Offerors seek to keep secret from MTA, and to make difficult for NSR to review, apparently would be offered to support the argument that the Offerors' OFA is for continued freight rail service. Although the information would not be persuasive if it consists of mere vague and conditional letters of support, MTA and NSR as the parties in interest should have the right to review and respond to such allegations. The Offerors must provide verifiable and verified proof of the putative market for rail freight services the Offerors claims a desire to serve on the subject line to support its OFA. The Offerors should be required to present such supporting information publicly, but in any event they should provide it to the parties in interest without causing them further undue expense.

Riffin has no compunction at wasting the resources of others, including the Board, in his campaign of frivolous litigation and abuse of court and agency processes.¹³ Apparently neither does any of the other Offerors. Especially at this time of economic downturn and scarce resources, NSR should not be required to hire outside counsel to review and comment on documents that (i) are unlikely to involve established or committed commercial relationships, (ii) can not involve transactions or business as to which the Offerors and NSR both would be competitive, (iii) are integral to the issues in a type of proceeding that NSR routinely handles with in-house counsel and (iv) may even be repetitive of documents disclosed in previous proceedings. The subject documents will almost certainly prove to be immaterial, irrelevant, unverified, indefinite, conditional and unpersuasive, as have such documents submitted by Riffin in previous proceedings.¹⁴ Despite the fact that the Board would likely draw the same

¹³ Such abuse is well represented by the claim, found in Paragraph 4B of the Motion for Protective Order, in which the Offerors claim to be in possession of a document, purport to detail the specifics of that document, but then claim that the Offerors cannot provide the document to the Board for fear of retaliation by MTA. Such a claim goes far beyond the ridiculous to the extent of being, in a word, silly. An administrative agency is not able to give any credence whatsoever to evidence claimed to be in existence, and in the possession of a person, but which the person refuses to provide.

¹⁴ In *Maryland Transit Administration - Petition for Declaratory Order*, STB Finance Docket No. 34975 (STB served September 19, 2008), a decision in which the Board found that MTA did not assume a common carrier obligation to provide freight service over the Cockeysville IT, the Board stated in footnote 13:

In one of his several "supplemental" filings, Riffin attached letters that he procured from four putative shippers, apparently to show that MTA removed active portions of the CIT or that MTA has interfered with NSR's ability to provide common carrier rail service. They contain equivocations such as: "If shipping our raw ingredients to us by rail was less expensive than shipping it via truck, we would consider using rail service." These letters, which are filtered to us through Riffin, are too vague and indefinite to be given any weight. Generally, a reasonable request for service is one that is specific as to volume, commodity and time of shipment.

See also *Los Angeles County Metropolitan Transportation Authority - Abandonment Exemption - in Los Angeles County, CA*, STB Docket No. AB-409 (Sub-No. 5X) (STB served July 17, 2008).

conclusion from the same or similar documents even if NSR did not see them, NSR should not be deprived of the opportunity to verify that the documents lacked probative value. NSR should be able to review and comment on the documents, especially if their lack of persuasive and probative value requires further analysis and argument, without going to undue expense to do so. The Board has recognized in the past that in-house counsel can treat genuinely confidential information appropriately, especially in this type of proceeding. In any event, in this case, the supposed confidential information is likely to be the same sort of general letter of support that are generally placed in the public dockets for the proceeding.

If a protective order is required at all in this proceeding, the form of the order proposed by the Offerors is overbroad and should be rejected or revised. NSR appends to this pleading a proposed revised protective order. It is, in substance,¹⁵ the same as the protective order and undertaking adopted by the Board in the *Veneer Spur Proceedings*,¹⁶ and would be appropriate

We would be surprised if the Offerors' confidential marketing data was not comprised of the same or similar letters or unverified statements that lack any probative value. NSR should not be required to rely on this reasonable supposition or to hire outside counsel to verify it, of course.

¹⁵ The proposed protective order requires persons to submit sufficient information to the Board in order to permit it to determine whether the person is a party or not.

¹⁶ While NSR fully expects MTA to receive the Offerors' allegedly confidential information and to adequately analyze and comment on it and further fully expects that the Board will carefully scrutinize any information submitted by the Offerors to determine whether it is material, relevant, verified, definite and genuinely supports its claims, NSR still should not be required to either hire outside counsel or be foreclosed from an opportunity to comment on the material. The Offerors' statement that "[t]he relationship between The Offerors and those businesses is tenuous, and will remain tenuous until such time that The Offerors demonstrate that they can in fact provide freight rail service in Cockeysville" is nearly identical to the following statement made by Riffin in his motion for a protective order in the *Veneer Spur Proceedings*: "[the relationship between Riffin and [prospective shippers] is tenuous, and will remain tenuous until such time that Riffin demonstrates that he can in fact provide freight rail service in Cockeysville." As NSR said in its response to Riffin's motion in that case, this statement in and of itself shows that the information is of questionable value, does not contain definite

for this proceeding, if indeed any protective order and undertaking are needed at all.

NSR is cognizant of the fact that the Board may desire to put in place a protective order before the Board is able to rule on NSR's Motion to Strike. The protective order proposed by NSR accommodates that, by providing a definition of "Party" appropriate to the circumstances of this proceeding.

For the reasons stated above, NSR respectfully requests that if the Board believes it necessary to issue a protective order at all in this proceeding, the Board issue a protective order and undertaking in the form that is attached in the Appendix and accompanying Exhibit.

Respectfully submitted,

NORFOLK SOUTHERN RAILWAY COMPANY

By: 

John V. Edwards, Senior General Attorney
James R. Paschall, Senior General Attorney
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Dated: January 14, 2010

commitments for using the Offerors' proposed service or establish any need or demand for such service. Therefore, it undermines rather than supports one of the very points the Offerors need to support and prove to make the OFA case.

APPENDIX
PROTECTIVE ORDER

1. For purposes of this Protective Order:

(a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.

(b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information.

(c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.

(d) “MDOT” means the Maryland Department of Transportation.

(e) “MTA” means the Maryland Transit Administration.

(f) “NSR” means Norfolk Southern Railway Company.

(g) “Other Party” means a Party other than MDOT, MTA or NSR.

(h) “Party” means a person affirmatively identified by the STB as a party to the Proceeding.

(i) “Proceeding” or “Proceedings” means the proceeding or proceedings before the Surface Transportation Board (“the Board”) concerning, related to or covered by STB Docket

No. AB-290 (Sub-No. 311X) and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

(j) "STB" means the U.S. Surface Transportation Board.

2. If NSR or the MTA, MDOT, or any of MDOT's modal administrations as a party to these Proceedings determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then that party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents so designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

3. If any Other Party determines that any part of a document he or she submits, discovery request he or she propounds, discovery response he or she produces, transcript of a deposition or hearing in which he or she participates, or pleading or other paper to be submitted, filed or served in these Proceedings contains Confidential Information or consists of Confidential Documents, then said Other Party may designate and stamp such Confidential Information and Confidential Documents as "CONFIDENTIAL." Any information or documents so designated or stamped as "CONFIDENTIAL" shall be handled as provided for hereinafter.

4. Information and documents designated or stamped as "CONFIDENTIAL" may not be disclosed in any way, directly or indirectly, to any person, party or entity except to an employee, counsel, consultant, or agent of a Party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents,

has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth in the Appendix to this Order.

5. Any Party to these Proceedings may challenge the designation by any other Party of information or documents as "CONFIDENTIAL" by filing a motion with the STB to adjudicate such challenges.

6. Designated Material must be kept either in the office of the senior general attorney or attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertakings) or its outside counsel or in the outside counsel of or in the office of the Counsel of MTA, may not be copied, and may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings.

7. Any person or Party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB and retained by the senior general attorney or attorney of NSR (or successor NSR in-house attorney who shall be bound by this Protective Order and Undertakings) or the outside counsel for a party to these Proceedings) at the earlier of (1) such time as the Party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands.

8. No person or Party may include Designated Material in any pleading, brief,

discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.

9. No person or Party may present or otherwise use any Designated Material at a hearing in these Proceedings, unless that person or Party has previously submitted, under seal, all proposed exhibits and other documents containing or reflecting such Designated Material to the STB to whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

10. If any person or Party intends to use any Designated Material in the course of any deposition in these Proceedings, that person or Party shall so advise counsel for the Party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in this Protective Order.

11. To the extent that materials reflecting Confidential Information are produced by a person or Party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1, 2, or 3 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of 49 U.S.C. 11904 or of any

other relevant provision of the ICC Termination Act of 1995.

12. All persons or Parties must comply with all provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.

13. Nothing in this Protective Order restricts the right of any person or Party to disclose voluntarily any Confidential Information originate by that person or Party, or to disclose voluntarily any Confidential Documents originated by that person or Party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other person or Party.

14. Any person or Party filing with the Board a "CONFIDENTIAL" pleading in these Proceedings should simultaneously file a public version of the pleading.

EXHIBIT

UNDERTAKING

CONFIDENTIAL MATERIAL

I, _____, have read the Protective Order served on _____, 2010, governing the production and use of Confidential Information and Confidential Documents in STB Docket No. AB-290 (Sub-No. 311X), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any Confidential Information or Confidential Documents obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purposes other than the preparation and presentation of evidence and argument in STB Docket No. AB-290 (Sub-No. 311X) before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Docket No. AB-290 (Sub-No. 311X). I further agree not to disclose any Confidential Information, Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL," other than file copies, kept by outside counsel or the senior general attorney or attorney of Norfolk Southern Railway Company (or successor NSR in-house attorney who shall be bound by this Undertaking), of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a Party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Print: _____

Title: _____

Affiliation: _____

Date: _____

VERIFICATION

I, Marcellus C. Kirchner, declare under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this Reply to Motion for Protective Order.

Executed on this 14th day of January, 2010.



Marcellus C. Kirchner

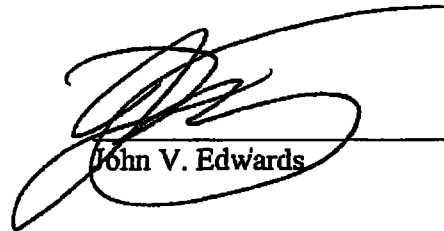
CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of the foregoing document on:

James Riffin
1941 Greenspring Drive
Timonium, MD 21093
jimriffin@yahoo.com

Charles A. Spitulnik
Kaplan Kirsch & Rockwell LLP
1001 Connecticut Avenue, NW
Suite 800
Washington, DC 20036
cspitulnik@kaplankirsch.com

Via e-mail on this 14th day of January, 2010.



John V. Edwards